

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEON LAMONT JOHNSON,

Defendant-Appellant.

UNPUBLISHED

June 13, 2013

No. 309243

Calhoun Circuit Court

LC No. 2011-001132-FH

Before: BECKERING, P.J., and SAAD and O'CONNELL, JJ.

PER CURIAM.

Defendant, Deon Lamont Johnson, appeals as of right his conviction for aggravated domestic assault, second offense, MCL 750.81a. Defendant's conviction arose out of an April 30, 2010, incident where defendant beat his girlfriend in the face in the carport of her apartment after she asked him to leave. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to 24 to 180 months' imprisonment. We affirm.

On appeal, defendant argues that the trial court denied him his right to self-representation. We disagree. We review for clear error the trial court's findings of fact and de novo its application of legal and constitutional standards. *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004). We review for an abuse of discretion the trial court's decision to permit or deny a request for self-representation. *People v Hicks*, 259 Mich App 518, 521; 675 NW2d 599 (2003). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *People v Portellos*, 298 Mich App 431, 453; 827 NW2d 725 (2012).

Although the right to have the assistance of counsel in a criminal prosecution is a fundamental constitutional right, a defendant may choose to forego the assistance of counsel. *Russell*, 471 Mich at 187-188. The right to self-representation is implicitly guaranteed by the Sixth Amendment of the United States Constitution, *Faretta v California*, 422 US 806, 819-820; 95 S Ct 2525; 45 L Ed 2d 562 (1975), and is recognized by the Michigan Constitution, Const 1963, art 1, § 13. However, this right is not absolute. *People v Anderson*, 398 Mich 361, 366; 247 NW2d 857 (1976). To proceed in propria persona, the defendant must unequivocally request the trial court to allow him to proceed without counsel. *Id.* at 367. The trial court then must determine whether the unequivocal request is a knowing, intelligent, and voluntary waiver of the defendant's right to assistance of counsel and whether permitting self-representation will

disrupt, unduly inconvenience, or burden the court. *Id.* at 368. Courts are to “make every reasonable presumption *against* the waiver” of the right to the assistance of counsel. *Russell*, 471 Mich at 188 (emphasis in original).

In a motion personally prepared and filed by defendant, defendant sought to, among other things, withdraw counsel and represent himself. Defendant detailed the many ways in which he was dissatisfied with his counsel’s representation and concluded that such a breakdown in the relationship made it “necessary” for him to proceed on his own behalf. At the hearing on defendant’s motion, the trial court asked defendant a series of questions that highlighted the dangers of his attempt to represent himself, after which defendant noted that he would like to withdraw counsel so that he could get new counsel. The court asked defense counsel to respond to defendant’s criticisms, and defense counsel did so, detailing his efforts to properly defend defendant. The trial court denied defendant’s request for self-representation and new counsel. An ambiguous request must be resolved in favor of continued representation by defense counsel. *Id.* at 193.¹ Although the trial court did not specifically find that defendant’s request was unequivocal, in light of the ambiguity of defendant’s request—wherein he expressed more frustration with existing counsel than desire to represent himself—the record does not permit us to conclude that defendant’s request was unequivocal. Thus, defendant was not denied the right to self representation. And because the trial court ultimately, and correctly, denied defendant’s motion, we do not find an abuse of discretion in its decision.

Defendant also argues that the trial court erred by instructing the jury not to consider inadmissible testimony regarding his prior incarceration or conviction. We disagree. We review this unpreserved claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

¹ In *Russell*, the defendant moved the trial court to remove his trial counsel and appoint new counsel, which would have been his third appointed counsel. *Russell*, 471 Mich at 184 & n 2. The trial court denied the defendant’s request and presented him with several options, including self-representation. *Id.* at 184-185. The defendant expressly rejected the option of representing himself, indicating that he needed competent counsel. *Id.* at 185-186. After the defendant rejected all other options, the trial court empaneled a jury and had the defendant proceed in propria persona. *Id.* at 186. Our Supreme Court held that the trial court erred because the defendant had not unequivocally chosen self-representation or voluntarily waived his Sixth Amendment right to counsel. *Id.* at 192-194. The Supreme Court noted that “to the degree that defendant’s refusal to explicitly choose between continued representation by appointed counsel and self-representation created any ambiguity regarding defendant’s desire to unequivocally waive his right to trial counsel, any ambiguity should have been resolved in favor of representation because . . . courts *must* indulge every reasonable presumption against the waiver of the right to counsel.” *Id.* at 193 (emphasis in original).

At trial, the prosecutor asked the victim to describe when she met defendant. She testified that she first met him in the early nineties, at which time they were mutual friends, and then again in college in 2009 after defendant had been released from incarceration. She explained that they began dating in 2010. No objections were made, and neither the prosecution nor defense counsel followed up or otherwise referred to the victim's comment about defendant's prior incarceration. The prosecution called four witnesses, and defendant testified in his own defense. After each witness testified, the trial court asked the jurors if they had any questions of the witness. After defendant testified, two juror questions were submitted to the court. One question was, "What did the Defendant do time for?" At a conference with trial counsel held outside the presence of the jury, defense counsel argued that the question was inadmissible, and the trial court agreed. The trial court stated that it would tell the jury that the question was irrelevant and that it would give a cautionary instruction in the final instructions that they are not to consider the matter. Defense counsel did not object to the trial court's plan. When the jury returned, the trial court read the question to the jury and stated that "[t]here is testimony obviously that [defendant] was incarcerated for a time." The court instructed the jury that the issue was irrelevant, that it would give the jury "further instructions about that in the final instructions," and that the question would not be asked of defendant.

Defendant argues that by reading the question asked by one juror to the whole jury, the trial court served only to remind the jury of the victim's improper testimony. Contrary to defendant's assertion, it is possible that more than one of the jurors was pondering the significance of defendant's alleged prior incarceration. Even if we were to assume that repeating the question to the jury was plain error, we could not conclude on the record before this Court that any such error affected defendant's substantial rights. Curative instructions are presumed to cure most errors, *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008), and jurors are presumed to follow their instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Any prejudice caused by the trial court's articulation of the juror's question was cured by its explicit instruction that the issue of defendant's incarceration was irrelevant. Given the weight of the evidence against defendant and the instruction informing the jury that the issue was irrelevant, the trial court's handling of the juror question did not affect the outcome of the proceedings. Accordingly, we find that the trial court did not commit plain error affecting defendant's substantial rights. See *Carines*, 460 Mich at 763.

Defendant also alleges that the trial court erred when, during its final instructions, it again referred to the victim's improper testimony, which it described as "evidence that the defendant may have been convicted of a crime for which he's not on trial, a previous offense." The trial court raised the issue in order to give a curative instruction and advise the jury not to consider the evidence when determining guilt. Defendant claims that the trial court should not have given the curative instruction and that bringing up the subject again merely reminded the jury of the inadmissible testimony. Defendant also claims that the court made matters worse by characterizing the evidence as a possible conviction because not all incarcerations are due to convictions, such as when a person is incarcerated in jail on charges that are later dropped or for which the defendant is later acquitted. However, defense counsel twice expressed his approval of the final jury instructions; thus, we conclude that defendant has waived this issue. See *People v Kowalski*, 489 Mich 488, 504-505; 803 NW2d 200 (2011). Even if defendant had merely forfeited the issue, we conclude that under a plain-error analysis, the trial court's curative

instruction regarding the victim's improper testimony was not plain error. See *Horn*, 279 Mich App at 36; *Graves*, 458 Mich at 486.

Affirmed.

/s/ Jane M. Beckering
/s/ Henry William Saad
/s/ Peter D. O'Connell